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Nos. 73-1057 and 73-1058

In the Supreme Court of the United States

OCTOBER TERM, 1973

DANIEL JAMES EDIN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES JEROME ASTALOS AND WILLIAM DALLAS BERMEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the evidence was insufficient to show that the goods they were convicted of stealing were taken from interstate shipments.

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted on three counts of interstate theft and one count of conspiracy, in violation of 18 U.S.C. 2, 659, and 371. Petitioner Astalos was sentenced to imprisonment for three concurrent terms of eight years

on the substantive counts and to a concurrent term of five years on the conspiracy count. Petitioners Bermel and Edin were sentenced to imprisonment for concurrent terms of five years on all counts. Each petitioner was also fined $20,000. The court of appeals affirmed in a comprehensive opinion (Pet. App. B).

Middle Atlantic Warehouse Distributors, Inc., is an automobile supplies wholesaler operating out of a warehouse in Tonawanda, New York. It employs its own drivers and uses its own tractor-trailers to carry automotive parts from manufacturers in the Midwest to its warehouse, and from there to its 70 customers, 65 of whom are located throughout 13 Northeastern states (Tr. 99-101, 103). Two trailers, numbers 7105 and 7106, were loaded with supplies from the Middle Atlantic warehouse and sealed on July 20 and 21, 1972, respectively (Tr. 174, 176). Bills of lading were prepared by the warehouse manager indicating the contents of the shipment and routing directions to stops in Massachusetts, Connecticut, and Rhode Island (Tr. 173-177). At the close of business on Friday, July 21, 1972, both trailers remained at the loading dock, sealed but not connected to tractors (Tr. 178).

Later that evening (about 8:15 p.m.), a driver pulling trailer number 7107 arrived with a load of parts from the A & P Parts Company in Toledo, Ohio (Tr. 153-154). He parked the tractor and trailer, which was sealed shut, at the loading dock and deposited the bill of lading in the mailbox provided for arrivals after working hours (Tr. 155-157). The trailer was scheduled for unloading during normal business hours on Monday morning, July 24, 1972 (Tr. 184).

The next morning, Saturday, July 22, 1972, the warehouse manager came to work for a couple of hours, although Middle Atlantic was not open for business

(Tr. 179). He attached tractors to trailers 7105 and 7106, moved them away from the loading ramp into a parking lot adjacent to the warehouse, checked the tires, seals, and locks, placed the bills of lading on the consoles in the tractor cabs, and left them ready for their scheduled departure on Sunday evening and Monday morning, July 23 and 24, before the opening of business (Tr. 180-183).

Pursuant to petitioners' plan (Tr. 506-510), on Saturday, July 22, 1972, at about 10:30 p.m., petitioner Edin, one Albert Pries, and one David Gilmore (an FBI informant) went to the Middle Atlantic warehouse and, with keys provided to them by petitioner Astalos, started the tractors and drove out of the warehouse area with trailers 7105 and 7106 (which were in the parking lot awaiting departure) and 7107 (which was at the loading dock waiting to be opened and unloaded). The trucks were immediately stopped by FBI agents, who had set up roadblocks a short distance from the warehouse (Tr. 510-528).

Petitioners' contentions--that trailers 7105 and 7106 had not yet become interstate shipments at the time they were stolen, that trailer 7107 had ceased to be an interstate shipment at the time it was stolen, and that the phrase "moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property," as used in 18 U.S.C. 659, should be interpreted in the conjunctive rather than the disjunctive--were thoroughly considered and properly rejected by the court of appeals (Pet. App. B), upon whose opinion we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.